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WRONGFUL TERMINATION OF THE EMPLOYMENT-AT-WILL RULE IN CALIFORNIA: *DEHORNEY v. BANK OF AMERICA*

Historically, the employment-at-will doctrine has insulated employers from liability in wrongful discharge actions.¹ Until recently, an at-will employee could be discharged for good cause, bad cause, or no cause.² Recognizing the often severe consequences of the employment-at-will rule, an increasing number of jurisdictions are providing at-will employees some protection from arbitrary discharge.³ Indicative of the sweeping demise of an employer's absolute right to terminate an at-will employee is the fact that few states continue to strictly apply the employment-at-will rule.⁴

1. See, e.g., *Ruinello v. Murray*, 36 Cal. 2d 687, 227 P.2d 251 (1951) (a contract for permanent employment is terminable at the will of either party, unless it is based upon consideration other than the services to be rendered); *Swaffield v. Universal Ecsco Corp.*, 271 Cal. App. 2d 147, 76 Cal. Rptr. 680 (2d Dist. 1969) (employment agreements calling simply for performance of services are terminable by either party without additional consideration); *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1st. Dist. 1964) (contract for permanent employment is a contract for an indefinite period and is terminable by either party, regardless of ill will).

2. See, e.g., *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (4th Dist. 1960) (employer can terminate an at-will employee at any time for any reason); *Roberts v. Western Pac. R.R.*, 142 Cal. App. 2d 317, 298 P.2d 120 (1st Dist. 1956) (an indefinite employment is terminable at will by the employer, with or without cause); see also S. WILLISTON & W. JAEGER, *WILLISTON ON CONTRACTS* § 1017 (3d ed. 1967); A. CORBIN, *CORBIN ON CONTRACTS* § 684 (1960) (both treatises support the proposition that an indefinite hiring is terminable by either party at any time unless it is supported by independent consideration).

3. See L. LARSON & P. BOROWSKY, *UNJUST DISMISSAL* §§ 10.01-10.52 (1986) (state-by-state analysis of major statutory and judicial exceptions to the employment-at-will rule). See also Strasser, *Employment-At-Will: The Death of a Doctrine*, NAT'L L.J., Jan. 20, 1986, at 1 (noting that forty states currently recognize exceptions to the employment-at-will doctrine).

4. Only the following states have not recognized exceptions to the employment-at-will doctrine: Delaware, Florida, Georgia, Iowa, Louisiana, Mississippi, Rhode Island, Utah, and Vermont. See, e.g., *Heidleck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982) (court refused to enforce provision of employee handbook received by employee after starting work); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. App. 1985) (court refused to recognize a cause of action where employee terminated for refusing to construct water and sewage treatment facilities without proper government approval); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978) (motives of employer in dismissing at-will employee are legally immaterial); *Janda v. Iowa Indus. Hydraulics, Inc.*, 326 N.W.2d 339 (Iowa 1982) (public policy exception does not protect an at-will employee from being fired at any time); *Gil v. Metal Service Corp.*, 412 So. 2d 706 (La. App.) (Louisiana's traditional and unique deference to legislative authority precluded creation of purely judicial exception to employment-at-will rule), writ denied, 445 So. 2d 1232 (La. 1982); *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985) (employer's absolute right to fire an at-will employee when employment contract explicitly termed employee's status as at-will upheld); *Dudzik v. Leesona Corp.*, 473 A.2d 762 (R.I. 1984)

California is at the forefront of the judicial movement to harness the employer's absolute right to discharge at-will employees. Since 1980, California has adopted three distinct theories of recovery that limit the potentially egregious consequences that result from mechanically applying the employment-at-will rule: 1) a tort cause of action for wrongful discharge in violation of public policy;⁵ 2) a contract cause of action for wrongful discharge in breach of an implied covenant to terminate only for good cause;⁶ 3) a cause of action grounded in both contract and tort for an employer's wrongful discharge in breach of an implied covenant of good faith and fair dealing.⁷

California and a small minority of other jurisdictions recognize the most liberal exception to the employment-at-will rule and impose a duty of good faith and fair dealing on the employer-employee relationship.⁸ This exception holds that the covenant of good faith and fair dealing implicit in every contract requires that neither party injure the right of the other to receive the benefits of the agreement.⁹ The recent decision in *DeHorney v. Bank of America*¹⁰ effectively abolishes the at-will presumption in California by

(employment contract of indefinite duration is terminable at will); *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979) (absent an express or implied stipulation as to duration of employment, employment is terminable at will); *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981) (termination of employee during thirty day trial period does not violate public policy).

5. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959). See *infra* notes 43-60 and accompanying text.

6. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981). See *infra* notes 61-81 and accompanying text.

7. See, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980). See *infra* notes 82-90 and accompanying text.

8. The following states recognize a good faith and fair dealing limitation to the employment-at-will doctrine: Alaska, California, Massachusetts, Montana, and North Dakota. See, e.g., *Mitford v. de Lasala*, 666 P.2d 1000 (Alaska 1983) (covenant of good faith and fair dealing prevented employer from firing employee solely to prevent him from receiving contracted share of profits); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980) (longevity of employee's service together with expressed employment policies of employer precluded discharge without good cause under covenant of good faith and fair dealing); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1971) (covenant of good faith and fair dealing violated where employee fired solely to prevent him from receiving commission on multimillion dollar sale); *Dare v. Montana Petroleum Mktg. Co.*, 687 P.2d 1015 (Mont. 1984) (existence of objective manifestations by employer give rise to employee's belief of job security and fair treatment); *Wadeson v. American Family Mut. Ins. Co.*, 333 N.W.2d 367 (N.D. 1984) (dicta recognized existence of good faith and fair dealing in employment contracts).

9. See *infra* notes 82-90 and accompanying text.

10. 777 F.2d 440 (9th Cir. 1985). The opinion of the United States Court of Appeals, Ninth Circuit, published in the advance sheet at this citation, was withdrawn from bound volume publication at the request of the court, which ordered that the petition for rehearing be stayed pending decision of the Supreme Court of California in *Foley v. Interactive Data Corp.*, 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985), *review granted*, 222 Cal. Rptr. 740, 712 P.2d 891 (1986). The full text of the *DeHorney* opinion can be found at 39 Fair Empl. Prac. Cas. 723

expanding the application of a good faith and fair dealing standard to virtually every employment situation. Prior to *DeHorney*, the good faith and fair dealing protection was available only where employees could establish a long term of service and a violation of express employment policies.¹¹ The *DeHorney* court held the good faith and fair dealing exception to be independent of any requirement of longevity of service and simply stated that the duty of fair dealing requires an employer to treat like cases alike.¹²

This Note will trace the development of the employment-at-will doctrine and the legislative and judicial limitations that have evolved to confront its application. The Note will then discuss the serious shortcomings of *DeHorney* and the impact its broad employee protection will have upon employers.

I. BACKGROUND

A. Development of the Doctrine

The origin of the employment-at-will rule can be traced to an 1877 treatise, *Master and Servant*,¹³ written by Horace G. Wood. The theory, commonly referred to as Wood's Rule, stated that a general or indefinite hiring is *prima facie* a hiring at will, without presumption of any term.¹⁴ However, courts and commentators calling for the demise of the at-will doctrine argue that none of the four cases cited in support of Wood's Rule actually support it.¹⁵

(BNA 1985).

The *Foley* decision is significant because it is the first employment-at-will decision to be heard by the California Supreme Court in a number of years. The *Foley* court held that the employee's alleged wrongful termination, for reporting that a superior had been released from a former job for suspected embezzlement, did not constitute a wrongful discharge in violation of public policy. 219 Cal. Rptr. at 870. The court found no statutory basis for *Foley*'s alleged duty to police his fellow employees. *Id.* The court next held that the statute of frauds precluded *Foley* from prevailing on his implied contractual claim. *Id.* Finally, the court determined that *Foley*'s seven years of service fell short of the necessary longevity required to assert a successful good faith and fair dealing claim. *Id.* at 871. Moreover, the court noted that *Foley* failed to adequately allege the existence of express formal procedures for terminating employees. *Id.* Because all three theories of recovery were asserted in *Foley*, the California Supreme Court is presented with the opportunity to alleviate the confusion surrounding wrongful termination law in California.

11. See *infra* notes 82-90 and accompanying text.

12. 777 F.2d at 448.

13. Wood's treatise states:

With us the rule is inflexible, that general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof [I]t is an indefinite hiring and is terminable at the will of either party

H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 273 (1877).

14. *Id.*

15. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 375, 710 P.2d 1025, 1030 (1985) (noting that none of four cited cases supported Wood's rule and that rule ran directly counter to another treatise); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311,

Although the legal foundation of the at-will rule may be questionable, it is clearly a product of the laissez-faire economic policies of the late nineteenth century.¹⁶ The at-will rule comported with the accepted notions of freedom of contract prevalent at the turn of the century.¹⁷ At that time, mutuality of obligation was considered necessary for a binding contract.¹⁸ Without some additional and independent consideration, an employee's work entitled him to a wage and nothing more.¹⁹ Because an employer had an undisputed

320 n.3, 171 Cal. Rptr. 917, 921 n.3 (1st Dist. 1981) (noting Wood's rule finds dubious support); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 602 nn.13-14, 292 N.W.2d 880, 886, 886-87 nn.13-14 (1980) (lengthy discussion of cited cases and conclusion that cases held that jury should infer contract duration from circumstances surrounding its formation); Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.-[KENT] L. REV. 697, 699-706 (1981) (noting Wood incorrectly interpreted four cited American cases); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-47 (1974) (discussing Wood's rule and its lack of justification) [hereinafter cited as Note, *Implied Contract Rights*]. But see W. HOLLOWAY & M. LEECH, *EMPLOYMENT TERMINATION RIGHTS AND REMEDIES* 27 (1985) (suggesting that Wood's rule was supported by cases cited earlier in his treatise).

16. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 319-20, 171 Cal. Rptr. 917, 921 (1st Dist. 1981) (industrial revolution in nineteenth century emphasized freedom of contract in employment relationships). See W. HOLLOWAY & M. LEECH, *supra* note 15, at 9-12 (prosperity thought to depend on elimination of all barriers to process of free exchange); Comment, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law*, 71 CALIF. L. REV. 942, 943-44 (1983) (acceptance of Wood's rule rooted in laissez faire economic principles present at turn of the century) [hereinafter cited as Comment, *State Actions for Wrongful Discharge*]; Note, *Implied Contract Rights*, *supra* note 15, at 343 (adoption of Wood's rule can be inferred from economic and social context in which it developed).

17. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 319-20, 171 Cal. Rptr. 917, 921 (1st Dist. 1981) (primary emphasis placed on freedom of parties to define their own relationship); see Comment, *State Actions for Wrongful Discharge*, *supra* note 16, at 943-44 n.11 (freedom of contract rationale prevailed at the turn of the century); Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825-26 (1980) (at-will rule conformed with premise of complete social freedom; individuals required to clearly obligate themselves before law would restrict employer's freedom to terminate) [hereinafter cited as Comment, *Protecting At Will Employees*].

18. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 448, 168 Cal. Rptr. 722, 725 (2d Dist. 1980) (absolute power of Labor Code § 2922 founded on contractual concept of mutuality of obligation); W. HOLLOWAY & M. LEECH, *supra* note 15, at 52-55 (section of treatise discussing development of modern mutuality of obligation theory that disregards requirement of symmetry); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967) (noting that even contracts for permanent employment were held unenforceable because they lacked mutuality of obligation).

19. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 449, 168 Cal. Rptr. 722, 725 (2d Dist. 1980) (noting that mutuality of obligation entitled employer to terminate employment relationship at his pleasure); W. HOLLOWAY & M. LEECH, *supra* note 15, at 43-52 (section in treatise discussing development of consideration theories and proposing abandonment of requirement of independent consideration for promise of job security); Comment, *State Actions for Wrongful Discharge*, *supra* note 16, at 944 (noting California courts required independent consideration to limit employers' power of discharge); Note, *Implied Contract Rights*, *supra* note 15, at 351-56 (discussing separate consideration as a condition to enforcing contracts of indefinite duration).

right to discharge an employee, the employee had a corresponding right to quit at any time for any reason.²⁰ Thus, the employment-at-will rule provided employers with the discretion necessary to fuel the rapidly expanding economy of the late nineteenth century.

By the twentieth century the at-will rule was so widely accepted that it took on a presumptive status. The United States Supreme Court protected an employer's absolute right to discharge an employee at will when it declared unconstitutional federal and state statutes forbidding the termination of employees for union membership.²¹

B. Legislative Limitations

In 1872, California became the first state to legislatively codify the employment-at-will doctrine. California Labor Code Section 2922 provides that: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."²² Employment for a specified term is defined as employment for a period greater than a month.²³ By its continued existence, Section 2922 serves as a legislative sanction of the employment-at-will doctrine.²⁴

The Depression and its resulting social legislation provided the first inroads into the employment-at-will doctrine.²⁵ The enactment of the National Labor Relations Act²⁶ in 1935 protected employees by prohibiting an employer from using discharge as a means of intimidating and coercing employees who

20. See Blades, *supra* note 18, at 1419 (noting irony that mutuality notion of employment relationship has been expressed as arising out of a concern for the freedom of employees); Comment, *The Covenant of Good Faith and Fair Dealing: A Common Ground for the Torts of Wrongful Discharge from Employment*, 21 SANTA CLARA L. REV. 1111, 1118 (1981) (at-will rule served perceived economic needs during a period of industrial expansion).

21. See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915) (Kansas statute outlawing discharge of employees for union activity declared unconstitutional); Adair v. United States, 208 U.S. 161 (1908) (federal statute forbidding discharge of employees because of union membership held unconstitutional). However, the rights of employers in employment decisions did not go totally unfettered, see Bunting v. Oregon, 243 U.S. 426 (1917) (law forbidding more than ten-hour day for manufacturing employees held within state's police power); Muller v. Oregon, 208 U.S. 412 (1908) (law forbidding employment of women in laundries for more than ten hours per day upheld); Holden v. Hardy, 169 U.S. 366 (1897) (law forbidding employment of coal miners in mine for more than eight hours per day upheld).

22. CAL. LAB. CODE § 2922 (West Supp. 1986).

23. *Id.*

24. Santa Monica Hosp. v. Superior Court, 172 Cal. App. 3d 698, 182 Cal. App. 3d 878, 218 Cal. Rptr. 543 (2d Dist. 1985), review granted, 222 Cal. Rptr. 224, 711 P.2d 520 (1986) (existence of Labor Code § 2922 prevented court from depriving employer's historic right to remove an employee where no length of employment is specified).

25. Lopakta, *The Emerging Law of Wrongful Discharge*, 40 BUS. LAW. 1, 6 (1984) (scarcity of jobs during Depression led to enactment of National Labor Relations Act).

26. 29 U.S.C. §§ 151-168 (1986).

exercised their right to organize.²⁷ However, this legislative limitation upon an employer's previously absolute right to discharge was narrowly confined to union activity.²⁸

Congress again significantly limited the employer's ability to discharge by enacting Title VII of the Civil Rights Act of 1964.²⁹ No longer could race, national origin or sex serve as a justification for employee termination. Additionally, other select groups have been protected by similar legislation.³⁰ However, this legislative protection does not extend to the bulk of the workforce.³¹

C. Judicial Limitations

Several factors have contributed to the recent judicial willingness to create exceptions to the employment-at-will doctrine. The most significant factor is the reluctance of many courts to judicially sanction egregious employer behavior by mechanically applying the at-will rule.³² In such cases, courts have determined that employees should not bear the expense of unwarranted and capricious employer acts.

Another factor is the erosion of the original justifications for the employment-at-will doctrine. Radical changes in employment relationships have occurred since the early 1900's.³³ Today, employees are more dependent on corporate employers and expect benefits beyond their salary.³⁴ There is also a great inequity in job security between union and non-union employees.³⁵

27. 29 U.S.C. § 158(a)(1), (3), (4) (1986) (prohibits discharge for union activity, protected concerted activity, or filing charges or giving testimony under the Act).

28. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (National Labor Relations Act constitutionally restrains employers from unjustly interfering with right of employees to organize).

29. 42 U.S.C. §§ 2000e-2, 2000e-3(a) (1981) (Title VII prohibits discharge based on race, color, religion, sex or national origin).

30. See Comment, *State Actions for Wrongful Discharge*, *supra* note 16, at 946 nn.31-34 (exhaustive listing of statutory protection for employees); Note, *Implied Contract Rights*, *supra* note 15, at 337 (noting various members of public and private sector that have been statutorily protected).

31. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 321, 171 Cal. Rptr. 917, 921 (1st Dist. 1981) (employees unable to form unions are left without protection). Approximately twenty-two percent of American employees are unionized. Comment, *Protecting At Will Employees*, *supra* note 17, at 1816 n.2.

32. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 380, 710 P.2d 1025, 1035 (1985) (court "compelled to conclude that termination of employment for refusal to participate in public exposure of one's buttocks is a termination contrary to the policy of this state").

33. See *Lopakta*, *supra* note 25, at 5 (noting change in employment relationship since at-will rule won acceptance).

34. As a result of non-union employees' inferior bargaining power, they are unable to adequately protect themselves from arbitrary termination. *Lopakta*, *supra* note 25, at 5.

35. See Comment, *Protecting At Will Employees*, *supra* note 17, at 1816 (noting differences in job security between public or union employees and employees in the private sector).

In addition, considering the level of state and federal regulation that modern businesses are subject to, it is clear that the laissez-faire economic principles of the late nineteenth century have faded away.³⁶ Finally, the theories of contract law that govern employment relationships have significantly changed. Modern contract law no longer requires mutuality of obligation.³⁷ Today, contracts must simply be supported by adequate consideration.³⁸ There is no longer a requirement of perfectly matching consideration on both sides.³⁹ Thus, an employee's work is sufficient consideration to support an employer's promise beyond the payment of wages.

In response to the often harsh consequences of the employment-at-will rule, California courts have developed three theories of recovery to provide at-will employees protection from arbitrary discharge: a tort cause of action for wrongful discharge in violation of public policy;⁴⁰ a contract cause of action for wrongful discharge in breach of an implied covenant to terminate only for good cause;⁴¹ and a cause of action grounded in both contract and tort for wrongful discharge in breach of an implied covenant of good faith and fair dealing.⁴²

1. Public Policy

While the public policy exception is the most widely accepted limitation to the at-will rule, it is also the narrowest.⁴³ The seminal California case of *Petermann v. International Brotherhood of Teamsters*⁴⁴ imposed a significant limitation on an employer's absolute right to terminate employees at will by nullifying the right to discharge an employee who refuses to perform an unlawful act. In *Petermann*, a union employee was discharged for refusing to perjure himself before a legislative committee.⁴⁵ The *Petermann* court held that to permit a discharge for refusing to commit a criminal act would be "obnoxious to the interests of the state and contrary to public policy."⁴⁶

36. See Lopakta, *supra* note 19, at 4 (atmosphere of intervention created by succession of labor and civil rights statutes have contributed to advancement of judicial exceptions to employment-at-will rule).

37. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981): "If the requirement of consideration is met, there is no additional requirement of . . . (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'" *Id.*

38. See Comment, *Protecting At Will Employees*, *supra* note 17, at 1819 (no additional consideration necessary to support a promise of job security).

39. *Id.*

40. See *supra* note 5.

41. See *supra* note 6.

42. See *supra* note 7.

43. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 n.5 (1983).

44. 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

45. *Id.* at 189, 344 P.2d at 28 (the terminated employee refused to follow his employer's instructions and gave truthful testimony under oath).

46. *Id.* at 188-89, 344 P.2d at 27.

Surprisingly, the *Petermann* decision was not a catalyst of wrongful discharge actions in California outside of the union setting. However, the long-dormant decision was revived by an at-will employee in *Tameny v. Atlantic Richfield Co.*⁴⁷ The *Tameny* court held that an employee discharged for refusing to engage in illegal conduct at his employer's request may bring a tort action for wrongful discharge.⁴⁸ In *Tameny*, an employee with fifteen years of service was discharged when he refused to participate in an illegal scheme to fix retail gasoline prices.⁴⁹ The court imposed a duty on all employers to help implement the fundamental public policy embodied in the penal statutes.⁵⁰ The *Tameny* standard states that when an employer's motivation for a discharge contravenes some substantial public policy principle, the employer is held liable to the employee for both contract and punitive damages.⁵¹ The public policy exception can be alleged when an at-will employee is discharged for refusing to commit a wrongful act, performing a public obligation, or exercising a legal right or privilege.⁵²

The employee in *Tameny* also alleged that his discharge constituted a breach of the implied covenant of good faith and fair dealing inherent in every contract.⁵³ The California Supreme Court found it unnecessary to address that issue because a tort remedy was already available to the employee under the public policy exception to the employment-at-will rule.⁵⁴ Although the court reserved judgment on the good faith and fair dealing exception, it recognized its existence in other jurisdictions in the wrongful discharge setting and its importance in California insurance cases.⁵⁵ This dictum laid the foundation for future cases seeking to extend the good faith and fair dealing exception to California wrongful discharge actions.

The common law requirement in California that a cause of action be supported by statutory authority in order to satisfy the "substantial public policy" standard has restricted the reach of the *Tameny* decision.⁵⁶ In *Shapiro v. Wells Fargo Realty Advisors*, the court expressly held that "courts have no power to declare public policy in wrongful discharge cases without statutory support."⁵⁷ In *Shapiro*, a discharged employee's public policy claim

47. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

48. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846.

49. *Id.* at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

50. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846 (employer's authority does not include right to demand that employee commit a criminal act).

51. *Id.* at 177, 610 P.2d at 1336, 164 Cal. Rptr. at 845.

52. See Lopatka, *supra* note 25, at 6-17 (discussion of cases falling within each category).

53. *Tameny*, 27 Cal. 3d at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12 (1980).

54. *Id.*

55. *Id.*

56. See *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613, 618 (2d Dist. 1984).

57. *Id.*

was unsuccessful because he failed to allege that he was terminated for asserting a statutory right, or refusing to commit an illegal act, or because the employer directly violated a statute by discharging him.⁵⁸ The *Shapiro* court also held that California has no public policy to promote job security and stability in the community.⁵⁹ Further, the court considered the existence of California Labor Code Section 2922 as compelling evidence that "termination at-will is not, standing alone, a violation of public policy."⁶⁰ Clearly, the California courts have concluded that, absent statutory authority, employees are not entitled to permanent employment as a matter of public policy.

2. Implied Contract

A second theory embraced by the California courts limits the employer's right to discharge when an employee can prove the existence of an express or implied agreement that his employment can be terminated only for good cause. In *Pugh v. See's Candies, Inc.*,⁶¹ a California Court of Appeals held that the presumption that an employment contract is intended to be terminable at will is subject to contrary evidence. In *Pugh*, an employee with thirty-two years of service was so completely unprepared for his termination that he expected to receive a promotion when called to be discharged by his superior.⁶² During the entire period of his employment, there had been no formal or written criticism of his work.⁶³

The *Pugh* court established a two-tier test to invoke the protection of an implied promise not to terminate its employees arbitrarily. In the first tier, the court determines whether the employee can rebut the statutory presumption of at-will status by showing an implied term of the contract to the contrary.⁶⁴ This test was satisfied in *Pugh* by the employer's express policies not to treat its employees arbitrarily.⁶⁵ The second tier involves several factors that, considered in the "totality of the parties' relationship" can establish an implied promise for continued employment.⁶⁶ These factors include the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.⁶⁷ Following traditional contract analysis, the *Pugh*

58. Shapiro simply alleged that although he was performing satisfactorily, he was fired without cause. *Id.*

59. *Id.* at 477 n.5, 199 Cal. Rptr. at 618 n.5.

60. *Id.*

61. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

62. *Id.* at 317, 171 Cal. Rptr. at 919.

63. *Id.*

64. *Id.* at 324, 171 Cal. Rptr. at 924.

65. *Id.* at 329, 171 Cal. Rptr. at 927.

66. *Id.*

67. *Id.* at 327, 171 Cal. Rptr. at 925-26.

court held that the employee's thirty-two years of service, commendations and promotions, lack of criticism of his work, and the expressed policies of the employer combined to establish an implied promise to terminate only for good cause.⁶⁸

It is noteworthy that when presented with facts similar to the main California good faith and fair dealing case, *Cleary v. American Airlines, Inc.*,⁶⁹ the *Pugh* court chose to expressly reject the applicability of the good faith and fair dealing standard.⁷⁰ In fact, the employee in *Pugh* had been employed nearly twice as long as the employee in *Cleary*.⁷¹ The *Pugh* court held that the employer's acceptance of responsibility to refrain from arbitrary conduct, as evidenced by its express policies, was better analyzed with traditional contract theories.⁷²

A recent California case to shed light on the first tier of the *Pugh* test is *Shapiro v. Wells Fargo Realty Advisors*.⁷³ In *Shapiro*, an employee signed a stock option agreement that expressly defined his employment relationship as employment-at-will.⁷⁴ The court held that Shapiro was unable to rebut the presumption of his at-will status because an express contract and implied contract on the same subject cannot be contradictory.⁷⁵ Thus, evidence of an express agreement defining an employee's status as at-will precludes the application of the second tier of the *Pugh* "totality of the relationship" test.

Other jurisdictions recognizing the implied contract exception use a more contemporary form of contractual analysis than California. Representative of the modern approach is the New Jersey decision of *Woolley v. Hoffmann-LaRoche, Inc.*⁷⁶ The *Woolley* court held that promises of job security contained in an employment manual constituted an offer.⁷⁷ The context of the manual's careful preparation and its pervasive distribution as the "official policy" of the company supported the conclusion that the manual was the most reliable statement of the company's terms of employment.⁷⁸ The court

68. *Id.* at 329, 171 Cal. Rptr. at 927.

69. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980).

70. The court found the *Cleary* result to be "equally explicable in traditional contract terms." *Pugh*, 116 Cal. App. 3d at 328-29, 171 Cal. Rptr. at 926-27.

71. *Id.* at 328, 116 Cal. Rptr. at 927.

72. *Id.* at 329, 116 Cal. Rptr. at 927.

73. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (2d Dist. 1984).

74. The Stock Option Agreement stated: "Nothing in this . . . Agreement . . . shall confer upon the Employee any right to continue in the employ . . . or shall interfere with or restrict in any way the right . . . to discharge the Employee at any time for any reason whatsoever, with or without good cause." *Id.* at 473 n.1, 199 Cal. Rptr. at 616 n.1.

75. *Id.* at 482, 199 Cal. Rptr. at 622. The court held that "there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." *Id.*

76. 99 N.J. 284, 491 A.2d 1257 (1985). It is noteworthy that the *DeHorney* court also relied on *Woolley*. 777 F.2d at 449 n.9.

77. *Woolley*, 99 N.J. at 300-01, 491 A.2d at 1266.

78. *Id.*

also held that the employee's continued work, while under no obligation to do so, was sufficient consideration to constitute a valid acceptance by the employee.⁷⁹ In applying a unilateral contract analysis, the *Woolley* court held that in choosing to establish personnel policies, the employer bargained for the continued work by their employees and the resulting loyalty and cooperation that arises from knowing they will be treated fairly.⁸⁰ Thus, the court held that implied promises of job security contained in employment policy manuals could be contractually enforceable.⁸¹ This analysis can be applied to either express written or oral promises of job security.

3. Good Faith and Fair Dealing

Only a small number of states recognize the broadest exception to the employment-at-will doctrine, the implied duty of good faith and fair dealing.⁸² The first California case to impose this duty is *Cleary v. American Airlines, Inc.*⁸³ *Cleary* held that the implied covenant of good faith and fair dealing in every contract requires that neither party injure the right of the other to receive the benefits of the agreement.⁸⁴ In *Cleary*, an employee with eighteen years of satisfactory service was terminated after being falsely accused of theft, leaving his work area without authorization, and threatening another employee with bodily harm.⁸⁵ The employer violated its established employment policies by failing to afford the employee a fair and impartial hearing to protest his discharge.⁸⁶ The *Cleary* court held that the longevity of an employee's service together with the expressed employment policy of the employer operated as a form of estoppel, precluding any discharge by the employer without good cause.⁸⁷ The court held that discharging an employee with eighteen years of service without legal cause offends the implied covenant of good faith and fair dealing contained in all contracts.⁸⁸ The court imposed a duty upon the employer to do nothing that would

79. *Id.* at 302-03, 491 A.2d at 1267.

80. *Id.* at 302-04, 491 A.2d at 1267-68.

81. *Id.* at 306, 491 A.2d at 1269. Other jurisdictions have made similar conclusions. *See, e.g.,* *Frazier v. Colonial Williamsburg Found.*, 574 F. Supp. 318 (E.D. Va. 1983); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980).

82. *See supra* note 8 and accompanying text.

83. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (2d Dist. 1980).

84. The concept of good faith and fair dealing was borrowed from California insurance law. *Id.* at 453, 168 Cal. Rptr. at 728 (quoting *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958)).

85. All of the accusations violated the employer's regulations. *Id.* at 447, 168 Cal. Rptr. at 722.

86. *Id.* at 447-48, 168 Cal. Rptr. at 724.

87. *Id.* at 456, 168 Cal. Rptr. at 729.

88. *Id.* at 455, 168 Cal. Rptr. at 729.

deprive the employee of the accrued benefit of their employment bargain.⁸⁹ Further, the existence of the employer's express policy regarding adjudicating employee disputes compelled the conclusion that the employer recognized its obligation to engage in good faith and fair dealing with all of its employees.⁹⁰ Therefore, the *Cleary* holding states that longevity of service combined with the existence of express policies that confer just treatment impose a standard of good faith and fair dealing upon California employers.

II. THE *DEHORNEY* DECISION

Vicki DeHorney was employed as a teller with Bank of America for nine months when a \$20 discrepancy was discovered in her daily tally.⁹¹ An internal auditor was assigned to investigate the matter and interrogated DeHorney about the discrepancy.⁹² During the interrogation, DeHorney interpreted one of the auditor's statements as a racial slur.⁹³ As a result of the interrogation the auditor concluded that DeHorney had stolen the money, even though DeHorney denied any wrongdoing.⁹⁴ The auditor filed an investigation report stating her conclusions and DeHorney was subsequently discharged.⁹⁵ DeHorney brought a suit against Bank of America and the auditor in California state court for wrongful discharge, interference with contractual relations, intentional infliction of emotional distress and racial discrimination.⁹⁶ Because of the civil rights claim, the action was removed to federal district court, where summary judgment was granted for the defendants.⁹⁷ DeHorney appealed the dismissal of all of her causes of action

89. These employment benefits accrued over the employee's eighteen years of service. *Id.*

90. *Id.*

91. *DeHorney v. Bank of America*, 777 F.2d 440, 442 (9th Cir. 1985). DeHorney had reprocessed a \$20 check that had already been processed and cancelled through her cash paid checks. This error resulted in a \$20 cash shortage. Until this incident, DeHorney had a good work record. *Id.*

92. *Id.*

93. *Id.* at 443. During the interrogation the auditor said "you people are always having problems." DeHorney responded, "Are you calling me because I'm Black?" The auditor replied "Don't give me that god dam[n] bullshit." *Id.*

94. *Id.*

95. *Id.* The auditor's investigation report stated that DeHorney "removed a \$20 check from a customer's check file and *negotiated* it through her cash pays." However, the actual Bank of America form ordering DeHorney's termination simply stated "suspected negotiation of a previously cash paid check \$20." *Id.* (emphasis in original).

96. *Id.*

97. *Id.* at 443-44. DeHorney claimed racial discrimination in violation of 42 U.S.C. § 1981. Bank of America removed the action to federal court pursuant to 28 U.S.C. § 1446, based on the federal question raised in DeHorney's racial discrimination claim. Summary judgment was granted as to the intentional interference with contractual relations claim because the court held that agents cannot conspire with their corporate principal while acting within the scope of their employment. The racial discrimination claim failed because the court found no evidence to

except the claim of intentional infliction of emotional distress.⁹⁸

The United States Court of Appeals for the Ninth Circuit held that summary judgment was proper with respect to DeHorney's claims of interference with contractual relations and racial discrimination.⁹⁹ In order to address DeHorney's wrongful discharge claim, the court first concluded that DeHorney was an at-will employee.¹⁰⁰ This decision was based upon an express employment agreement signed by DeHorney that provided she could be terminated at will.¹⁰¹ Even without this express agreement, California Labor Code Section 2922 has codified the at-will doctrine, and therefore, DeHorney's at-will status was presumed.¹⁰² The court, however, noted recent California decisions that limited the application of Section 2922.¹⁰³ The focus of the *DeHorney* decision was to address the applicability of the three available theories of recovery to an at-will employee in a wrongful discharge action.

The court held that only DeHorney's claim of discharge based on racial bias was sufficient to offend public policy.¹⁰⁴ However, because DeHorney failed to establish a *prima facie* case of racial discrimination, the court held she could not recover under the public policy exception to the employment-at-will rule.¹⁰⁵ The court next applied the "totality of the parties' relationship" test established in *Pugh*, and held that DeHorney had not satisfied

establish the necessary nexus between the alleged racially biased statement and the decision to terminate. The wrongful discharge claim was unsuccessful because the court held that Bank of America had good cause to terminate DeHorney since she lost control of her cash paid items, a terminable offense under bank employment policies. *Id.*

98. *Id.* at 444.

99. *Id.* at 445-46, 452-53. As to DeHorney's interference with contractual relations claim, the court held that because the auditor was acting within the scope of her employment, her actions in advising Bank of America are privileged and justified by the confidential employer-employee relationship. *Id.* at 445-46. Moreover, because agents cannot conspire with their corporate principal when they act in their official capacity, the auditor was held to be free of liability. *Id.* The court of appeals upheld the dismissal of DeHorney's racial discrimination claim because DeHorney failed to satisfy her evidentiary burden of establishing that race, more likely than not, was a factor in her termination. *Id.* at 452-53. In fact, no evidence was offered to establish that Bank of America had considered DeHorney's race in its termination decision. *Id.*

100. *Id.* at 447.

101. *Id.* The written employment agreement provided that DeHorney could be released with or without cause during a three month trial period. Additionally, after the trial period, DeHorney's "permanent status" entitled her to "two weeks notice or one-half month's salary in case of dismissal unless such dismissal results from dishonesty, disloyalty, insubordination, or other good cause." *Id.*

102. *Id.* See *supra* notes 22-24 and accompanying text.

103. *Id.* The court set out the three distinct theories of recovery, with respect to at-will employment contracts: 1) a tort cause of action for wrongful discharge in violation of public policy; 2) a contract cause of action for the employer's breach of an implied in fact covenant only to terminate for good cause; 3) a contract and tort cause of action for the employer's breach of the implied covenant of good faith and fair dealing. *Id.* (citations omitted).

104. *DeHorney*, 777 F.2d at 447.

105. *Id.* See *supra* note 99 regarding DeHorney's racial discrimination claim.

the requirements necessary to establish an implied covenant to terminate only for cause.¹⁰⁶ The distinguishing factor the court relied upon was that DeHorney had not established a long term of employment.¹⁰⁷ The *DeHorney* court held this relatively short term of employment to singularly override the other factors in the *Pugh* test.¹⁰⁸

The *DeHorney* court next addressed the applicability of the good faith and fair dealing exception.¹⁰⁹ The court held that the good faith and fair dealing exception is independent of any consideration of longevity required by the implied contract exception because an employer must engage in good faith and fair dealing with all of its employees.¹¹⁰ This is grounded in the well-settled California law that implies a covenant of good faith and fair dealing in every contract.¹¹¹ The court applied the definition of fair dealing in the context of at-will employment from *Rulon-Miller v. International Business Machines Corp.*,¹¹² which stated that the duty of fair dealing requires an employer to treat like cases alike.¹¹³ Implied in this covenant is the

106. *DeHorney*, 777 F.2d at 448.

107. *Id.* The court noted that in *Shapiro* an employee terminated after three and one-half years of service also failed to satisfy the *Pugh* "totality of the relationship" test. However, this argument is unfounded because in *Shapiro*, the court held that the employee failed to rebut his status as an at-will employee. See *supra* notes 73-75 and accompanying text. Thus, by strictly following the two-tier *Pugh* test, the *Shapiro* court never considered the *Pugh* "totality of the relationship" factors and made no finding based on the employee's length of service. *Shapiro*, 152 Cal. App. 3d at 593, 199 Cal. Rptr. at 621-22.

Other California cases where an employee's length of service was held to be determinative include *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982) (seventeen, eighteen and twenty-five years of service); *Pugh*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (thirty-two years of service); *Cleary*, 111 Cal. App. 3d 433, 168 Cal. Rptr. 722 (eighteen years of service). But cf. *Foley v. Interactive Data Corp.*, 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985), review granted, 222 Cal. Rptr. 740, 712 P.2d 891 (1986) (employee's seven years of service fell short of necessary longevity).

108. *DeHorney*, 777 F.2d at 448. After presenting the various *Pugh* factors, the court failed to consider any but DeHorney's short term of employment. *Id.*

109. *Id.*

110. *Id.* at 448 n.8. This conclusion rests on a novel interpretation of *Cleary v. American Airlines, Inc.*, that treats as independent the two elements necessary to invoke the good faith and fair dealing exception. See *infra* notes 150-72 and accompanying text.

111. *Id.* (citing *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984)).

112. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1st Dist. 1984).

113. *DeHorney*, 777 F.2d at 448. A concurring opinion disagreed with this conclusion, finding it inconsistent with the Ninth Circuit's opinion in *Gianaculus v. Trans World Airlines, Inc.*, 761 F.2d 1391 (9th Cir. 1985). In *Gianaculus*, the court held that personnel policies and procedures embodied in the employment manual did not become the measure of good faith and fair dealing where the employment contract expressly permits termination at will. *Id.* at 1395. DeHorney's employment agreement also expressly provided that she could be terminated at will. 777 F.2d at 447. The *DeHorney* majority did not follow *Gianaculus* because that decision did not "consider the effect of *Rulon-Miller*." *Id.* at 451. The concurring judge, however, was concerned that the majority's interpretation of *Rulon-Miller* would provide a

employees' right to receive the benefit of rules and regulations adopted for their protection.¹¹⁴

After reviewing Bank of America's Code of Corporate Conduct, which detailed the obligations of employer and employee, the court concluded that there were several procedural deviations in DeHorney's dismissal.¹¹⁵ In fact, very few of Bank of America's termination procedures were complied with in DeHorney's termination.¹¹⁶ The court found that a question of fact existed as to whether Bank of America breached its duty to treat like cases alike.¹¹⁷ Therefore, the court held that material issues of fact precluded summary judgment on the claim of breach of the implied covenant of good faith and fair dealing.¹¹⁸

III. ANALYSIS

Because California recognizes all three exceptions to the employment-at-will rule, the United States Court of Appeals evaluated the applicability of each to DeHorney's wrongful discharge claim.¹¹⁹ This analytical approach highlights how the underlying facts of an employee's termination dictate the availability of a particular exception to the at-will rule. The decision also illuminates the unsettled state of wrongful termination law in California by focusing on the inconsistent holdings that have resulted from the California courts' application of the three exceptions to the employment-at-will rule.

A. Public Policy

DeHorney's claim that her discharge violated public policy was summarily rejected by the court because she failed to establish a *prima facie* case of

contract or tort remedy for every termination deviating from the employer's established personnel policies. *Id.* at 454 (Canby, J., concurring). He went on to question *Rulon-Miller's* interpretation of the covenant of good faith and fair dealing and posited that Bank of America's Code of Corporate Conduct was not adopted for DeHorney's protection. *Id.*

114. *Id.* at 448-49.

115. *Id.* at 449. The primary purpose of the Code of Corporate Conduct with respect to employee terminations is to assure that "separations are carried out fairly and try to see that employees leave with a feeling of having been justly treated." Specific examples of procedural deviations surrounding DeHorney's termination include: 1) failure to afford DeHorney a personal interview to discuss her termination; 2) no attempt to make DeHorney feel she was justly treated; and 3) arguably the termination was not carried out fairly. *Id.*

116. *Id.*

117. *Id.* at 450-51. Bank of America procedures provide that a teller is not to be discharged for making a mistake. DeHorney contended she merely made a mistake when she placed the filing check with the cash paid checks. Although bank policies prescribe termination when an employee falsifies bank records or otherwise acts dishonestly, the form which ordered DeHorney's termination identified the reason for her dismissal as "suspected negotiation of a previously cash paid check \$20." Arguably, DeHorney's dishonesty was not sufficiently established at the time of her discharge. *Id.*

118. *Id.*

119. *Id.* at 447.

racial discrimination.¹²⁰ The test to establish a public policy exception is well settled in California. An employer will be liable for wrongful discharge if an employee can show that the employer's motivation for discharge contravenes some substantial public policy principle.¹²¹ The court held that only DeHorney's claim based on racial bias was sufficient to violate public policy.¹²² This comports with the California position that only terminations in violation of a legislative act clearly violate public policy.¹²³ However, because DeHorney failed to satisfy the burden of proof necessary to establish a racial discrimination claim under federal law, there was no statutory violation sufficient to invoke the public policy exception.¹²⁴

The *DeHorney* decision typifies the limited reach of the public policy exception in affording employees job security. The scope of the exception is greatly restricted by the California common law requirement that a cause of action be supported by statutory authority in order to satisfy the "substantial public policy" standard.¹²⁵ When an employee is terminated for refusing to commit an illegal act¹²⁶ or the employer directly violates a statute by discharging the employee,¹²⁷ a successful public policy cause of action can be made. A public policy cause of action can also be inferred from statutory authority, even where the discharge is not explicitly prohibited.¹²⁸ In such cases, a violation of public policy is inferred because the employer's motive for termination violates a statutory policy.¹²⁹

While dicta in several California cases suggests that there can be a public policy sufficient to support a cause of action for wrongful discharge absent

120. *Id.*

121. *Tameny*, 27 Cal. 3d at 177, 610 P.2d at 1336, 164 Cal. Rptr. at 845 (1980).

122. *DeHorney*, 777 F.2d at 447.

123. The court found the necessary statutory support in DeHorney's racial discrimination claim, which was grounded on 40 U.S.C.A. § 1981 (1986), a federal civil rights statute. To date no California wrongful discharge claim based upon the public policy exception has succeeded without statutory support. See Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 76-83 (1982) (noting the sources of public policy: either directly established based on a potential violation of a statute or determined tangentially from the existence of statutes).

124. *DeHorney*, 777 F.2d at 447. See *supra* note 99 and accompanying text.

125. See *Shapiro*, 152 Cal. App. 3d at 477 n.5, 199 Cal. Rptr. at 618 n.5.

126. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee refused to participate in illegal scheme to fix retail gasoline prices); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959) (employee refused to perjure himself before a legislative committee).

127. See, e.g., CAL. LAB. CODE § 132(a) (West Supp. 1986) (prohibiting retaliatory discharge of employee filing worker's compensation claim).

128. See Miller & Estes, *supra* note 123, at 79-80 (section discussing circumstances where public policy is inferred from a statute).

129. *Id.* See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F. 2d 1367, 1374 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1984) (employee allegedly discharged for reporting shipment of adulterated milk to health officials after supervisors ordered him to deliver it); *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 298, 188 Cal. Rptr. 159, 164 (1st Dist. 1982) (employee allegedly discharged for demanding a smoke free workplace).

statutory authority,¹³⁰ California courts have been unwilling to make this extension. In *Shapiro*, the court expressly held that courts have no power to declare public policy without statutory support.¹³¹ Thus, this judicial exception provides little employee protection beyond that already embodied in California statutory law.

This strict adherence to the requirement of statutory authority makes the public policy exception to the employment-at-will rule the most predictable and easy to apply. For these reasons, the *DeHorney* court had little difficulty in upholding the dismissal of DeHorney's public policy claim. Further, the California judiciary's willingness to defer to the legislature in defining what constitutes a sufficient public policy comports with California Labor Code Section 2922.¹³²

B. Implied Contract

DeHorney's contractual claim of wrongful discharge in violation of an implied covenant to terminate only for cause was rejected because DeHorney had not established a long term of employment.¹³³ As set out in the *Pugh* "totality of the relationship" test, the longevity of an employee's service is one of the factors to be considered in finding an implied promise that an employee can only be terminated for good cause.¹³⁴

Had the *DeHorney* court more closely followed the two-tiered *Pugh* test, they would have eliminated the need to consider the factors that establish an implied promise not to discharge except for good cause.¹³⁵ The first tier requires the court to determine whether the employee can rebut the statutory presumption of at-will status by showing an implied term of the contract to the contrary.¹³⁶ Recent California decisions have held that written employment policies that provide procedural protections prior to discharge overcome

130. *Tameny*, 27 Cal. 3d at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845 (employers can not contravene general statutes that articulate a fundamental public policy); *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 (equating public policy with "sound morality").

131. 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 618.

132. In *Santa Monica Hosp. v. Superior Court*, 172 Cal. App. 3d 698, 182 Cal. App. 3d 878, 218 Cal. Rptr. 543 (2d Dist. 1985), *review granted*, 222 Cal. Rptr. 224, 711 P.2d 520 (1986), the court noted the equitable appeal of the plaintiff's true posture, but held that "plaintiff's complaint discloses she was not employed for a specified term . . . within the meaning of Labor Code section 2922. Any further exceptions to or limits, if necessary on an employer's right to hire and dismiss, should be made by the legislature." 218 Cal. Rptr. at 548.

133. *DeHorney*, 777 F.2d at 448.

134. 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927.

135. *Shapiro*, 152 Cal. App. 3d at 481, 199 Cal. Rptr. at 621 (recent application of the *Pugh* two-tier test); *see also* Miller & Estes, *supra* note 123, at 100 (discussion of *Pugh* two-tier test).

136. *Pugh*, 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 924.

the presumption of at-will status.¹³⁷ There is no question that Bank of America's Code of Corporate Conduct outlined detailed termination procedures to ensure just treatment of its employees.¹³⁸ The recent case of *Shapiro v. Wells Fargo Realty Advisors*¹³⁹ presents a situation analogous to *DeHorney*. In *Shapiro*, the employee failed to rebut the presumption of his at-will status because he signed a stock option agreement that expressly defined his employment relationship as at-will.¹⁴⁰ Similarly, DeHorney signed a written employment agreement that expressly provided she could be terminated at-will.¹⁴¹ Therefore, DeHorney was unable to rebut her presumptive at-will status and it was unnecessary for the *DeHorney* court to consider the implied promise factors set out in the second tier of the *Pugh* test.

The implied contract exception to the employment-at-will rule in California is considerably different than the exception traditionally recognized by other state courts. In California, once an employee successfully rebuts the at-will presumption, they must then produce evidence, considered in light of the factors set out in *Pugh*, that would establish an implied promise that the employee would be terminated only for cause.¹⁴² By rejecting DeHorney's implied contract claim solely because she failed to establish a long term of employment,¹⁴³ the court disregarded the "totality of the employment relationship" test required by *Pugh*. While longevity of service is indeed a significant factor, other California decisions have not found it to be singularly determinative.¹⁴⁴

By recognizing an implied contract exception to the employment-at-will rule, California relies on the same contemporary contract law that forms the

137. See *Hillsman v. Sutter Community Hosps. of Sacramento*, 153 Cal. App. 3d 743, 753-56, 200 Cal. Rptr. 605, 611-13 (3d Dist. 1984) (employee terminated in violation of hospital by-laws); *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 902-05, 185 Cal. Rptr. 617, 621-22 (4th Dist. 1982) (employment handbook held to constitute terms of employment).

138. *DeHorney*, 777 F.2d at 449.

139. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (2d Dist. 1984).

140. *Id.* at 482, 199 Cal. Rptr. at 621.

141. *DeHorney*, 777 F.2d at 447.

142. *Shapiro*, 152 Cal. App. 3d at 481, 199 Cal. Rptr. at 621; *Pugh*, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 925-26.

143. *DeHorney*, 777 F.2d at 448.

144. *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 492-93 (9th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3085 (1985) (summary judgment inappropriate where employee had been employed for fifteen years, had been one of the top salesmen for the last eight years, received several commendations and no formal criticism of work during course of employment); *Crain v. Burroughs Corp.*, 560 F. Supp. 849, 853 (C.D. Cal. 1983) (implied contract claim denied where employee had less than two years of service and a less than satisfactory work record); *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 445, 203 Cal. Rptr. 9, 12 (2d Dist. 1984) (implied contract claim denied where employee had less than two years of service and a less than adequate performance record).

basis of the exception in other jurisdictions.¹⁴⁵ Representative of this approach is the disregard of the previous requirements of mutuality of obligation and separate independent consideration.¹⁴⁶ The key requirement of a binding contract under modern contractual theory is that there be adequacy of consideration.¹⁴⁷ Thus, it is ironic that while basing its implied contract exception to the employment-at-will rule on modern contract theory, California continues to adhere to the *Pugh* common law "factor" test to determine the exception's availability.

The formalistic contractual analysis applied by other jurisdictions, as outlined in *Woolley v. Hoffmann-LaRoche, Inc.*,¹⁴⁸ meets the objectives set out in *Pugh* that employment contracts should be construed to give effect to the intention of the parties.¹⁴⁹ The fact that DeHorney had been employed only nine months does not, by itself, compel the conclusion that an implied promise of termination only for cause did not exist. In fact, the application of a more formalistic contractual analysis, as set out in *Woolley*, might lead to the conclusion that Bank of America's policies, taken in their entirety, constituted a promise that DeHorney would not be terminated arbitrarily, regardless of the length of her service.

C. Good Faith and Fair Dealing

DeHorney's claim that her discharge was in violation of an implied covenant of good faith and fair dealing was upheld because the court determined that questions of fact existed as to whether Bank of America breached its duty to apply its termination rules and procedures¹⁵⁰ and treated DeHorney's investigation and termination in the manner required by Bank of America's Code of Corporate Conduct for similar teller discrepancies.¹⁵¹ The *DeHorney* court relied on a definition from *Rulon-Miller v. International Business Machines, Inc.*,¹⁵² stating that the duty of fair dealing requires that like cases be treated alike, which includes the right of employees to receive the benefit of rules and regulations adopted for their protection.¹⁵³

145. See *Miller & Estes*, *supra* note 123, at 98 (noting that the *Pugh* decision followed contemporary contract law by disposing of the requirements of mutuality or independent consideration).

146. The court viewed the requirement of these rules as one of construction and not substance. *Id.*

147. See Comment, *Protecting At Will Employees*, *supra* note 17, at 1819 (doctrine of consideration does not require perfectly matching promises on each side of a bargain).

148. 99 N.J. 284, 491 A.2d 1257 (1985). See also *supra* notes 76-81 and accompanying text (discussion of implied contract exception in other jurisdictions).

149. See *Pugh*, 116 Cal. App. 3d at 326, 171 Cal. Rptr. at 925.

150. *DeHorney*, 777 F. 2d at 451.

151. *Id.* at 450.

152. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1st Dist. 1984).

153. *DeHorney*, 777 F.2d at 448. But see *supra* note 113.

Curiously, the definition of good faith and fair dealing from *Rulon-Miller* fails to cite any authority as precedent.¹⁵⁴ More significant is the complete absence in the *Rulon-Miller* analysis of *Cleary*, the seminal and still active California employment-at-will good faith and fair dealing case.¹⁵⁵ Although *Cleary* and *Rulon-Miller* are from different California appellate districts, the *Cleary* approach is of higher precedential value because its rationale is supported by California Supreme Court dicta.¹⁵⁶

In *Cleary*, the court held that the longevity of the employee's service, together with the expressed policy of the employer, operated as a form of estoppel, precluding discharge without good cause.¹⁵⁷ These two factors were held to be of paramount importance in determining whether an employee asserted a viable good faith and fair dealing cause of action.¹⁵⁸ In light of recent cases following *Cleary*, it is clear that DeHorney's good faith and fair dealing cause of action would fail because of the brevity of her employment.

However, the *DeHorney* court interpreted *Cleary* as holding that the express policy of the employer is sufficient to support a good faith and fair dealing cause of action.¹⁵⁹ In reaching this conclusion, the *DeHorney* court relied upon language in *Cleary* that stated that the existence of employment policies compels the conclusion that the employer has recognized its duty to engage in good faith and fair dealing with respect to *all* its employees.¹⁶⁰ The *DeHorney* court further reasoned that its holding is consistent with general contract law in California.¹⁶¹ The court also cited *Woolley* for its holding that termination procedures contained in employment policy manuals are contractually enforceable.¹⁶²

154. 162 Cal. App. 3d at 247-48, 208 Cal. Rptr. at 529.

155. For recent decisions following the *Cleary* standard for good faith and fair dealing, see *Cancellor v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982) (implied covenant of good faith applied where employee alleges long service and existence of personnel policies showing implied promise not to act arbitrarily); *Comerio v. Beatrice Foods Co.*, 600 F. Supp. 765, 768-69 (E.D. Mo. 1985) (claim rejected because of short service and failure to bring forward policies giving employee reasonable belief that he would not be discharged except for good cause); *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 445-46, 203 Cal. Rptr. 9, 12 (2d Dist. 1984) (action based on naked covenant of good faith and fair dealing insufficient; must show combination of elements—longevity and company policies); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 478, 199 Cal. Rptr. 613, 619 (2d Dist. 1984) (employee failed to allege facts under either of two factors specified in *Cleary*).

156. The California Supreme Court recognized the good faith and fair dealing exception to the at-will rule in other jurisdictions and its applicability to California insurance cases. *Tameny*, 27 Cal. 3d at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12.

157. 111 Cal. App. 3d at 456, 168 Cal. Rptr. at 729.

158. *Id.*

159. The *DeHorney* court noted that the good faith and fair dealing theory of recovery is "independent of any consideration of longevity of service." 777 F.2d at 448, 448 n.8.

160. *Id.*

161. After reviewing other decisions, the court stated that its holding "is not in any substantial way a variation from general contract law in California." *Id.* at 448-49.

162. *Id.* at 449 n.9.

The primary weakness of the *DeHorney* decision is that it relies solely on contractual principles to arrive at its good faith and fair dealing holding. This is strikingly inconsistent because the court earlier concluded that DeHorney failed to support her implied contractual claim to terminate only for cause.¹⁶³ Under both exceptions DeHorney relied on Bank of America's Code of Corporate Conduct to support her cause of action.¹⁶⁴ It is peculiar that although DeHorney was unable to support a contractual claim, the same factors were sufficient to establish a combined tort and contract claim. Moreover, other jurisdictions limit the consideration of implied promises of job security contained in employment policies to a contractual analysis.¹⁶⁵ Support for this view is also found in California decisions. The *Pugh* court was presented with facts more deserving of the good faith and fair dealing exception than the *Cleary* court, but expressly chose a contractual analysis as a superior theory of recovery.¹⁶⁶

Because a tort cause of action arises from a breach of a duty,¹⁶⁷ this duty arguably accrues with an employee's continued service. This conclusion finds support in *Cleary*, which held that an employer's duty not to terminate an employee without legal cause accrued during the employee's eighteen years of service.¹⁶⁸ *Cleary* also held that the duty arising from the covenant of good faith and fair dealing is "unconditional and *independent* in nature."¹⁶⁹ Under a modern contractual analysis, express employer policies become part of the bargained for terms of employment.¹⁷⁰ Therefore, longevity of service provides the independent element necessary to satisfy a good faith and fair dealing claim. Using this analysis, DeHorney would fail to establish a good faith and fair dealing cause of action because her claim was not independent of her employment contract. Based on the above, the *DeHorney* court incorrectly interpreted the *Cleary* holding. Longevity of service *combined with* the existence of express policies conferring just treatment are required to impose a duty of good faith and fair dealing.¹⁷¹

163. *Id.* at 448.

164. *Id.* at 448-49. The concurring judge questioned whether the Code of Corporate Conduct was adopted for DeHorney's protection. *Id.* at 454 (Canby, J., concurring). He found it inconsistent that a vague directive providing for just treatment was sufficient to establish a duty of fair dealing, when that directive was contained in an employment agreement expressly terming the employment relationship as at-will. *Id.* See *supra* note 113.

165. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 88 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d (Minn. 1983); *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985).

166. See *supra* notes 69-72 and accompanying text.

167. W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS 4 (1984).

168. 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729.

169. *Id.* at 463, 168 Cal. Rptr. at 728 (emphasis in original).

170. See *supra* notes 76-81 and accompanying text.

171. *Cleary*, 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729 (emphasis added). In *Foley v. Interactive Data Corp.*, 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985), *review granted*, 222

By de-emphasizing the previous requirement of longevity of service, the *DeHorney* decision greatly expands the availability of the good faith and fair dealing exception to California at-will employees. Under *DeHorney*, a wrongfully terminated employee need only assert the existence of personnel policies conferring just treatment to invoke the good faith and fair dealing exception.¹⁷² Because most larger employers have some form of express employment policies, the decision effectively imposes a "good cause" standard for dismissal on all employers in California.

IV. IMPACT

Without question, employees in jurisdictions recognizing the good faith and fair dealing exception to the employment-at-will rule are afforded the greatest protection from arbitrary discharge.¹⁷³ The *DeHorney* decision significantly expands a California employer's potential for wrongful termination liability by relaxing the elements previously required for a valid good faith and fair dealing cause of action.¹⁷⁴ This wholesale relaxation avails the good faith and fair dealing standard to virtually all California employees. Thus, the *DeHorney* common law exception has effectively overruled the employment-at-will rule in California and in its place imposed a "good cause" standard.

The common law provision of increased job security imposes substantial costs on California employers. For example, a "good cause" standard of termination will hinder the growth of aggressive businesses by requiring them to retain "average" employees. This judicially imposed "tenure" system is also likely to carry serious economic costs in terms of productivity and efficiency. By disregarding the agreement signed by *DeHorney* that provided she could be terminated at will, the court implied that employees cannot voluntarily waive their rights to the *DeHorney* "good cause" standard.¹⁷⁵ Additionally, the overly broad *DeHorney* standard will produce societal costs by burdening the courts with reviewing the fairness of virtually every termination decision.

As is common with the development of a new theory of recovery, broadened liability for wrongful discharge is likely to cause many employers to

Cal. Rptr. 740, 712 P.2d 891 (1986), the court held that to prove a violation of the covenant of good faith and fair dealing, a plaintiff must show "longevity of service, and breach of an express employer policy regarding the adjudication of employee disputes." 219 Cal. Rptr. at 871 (emphasis added). The *Foley* court expressly disagreed with a California decision holding that "the theory of recovery articulated in *Cleary* is not dependent on the particular factors identified in that case." *Id.* (quoting *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 262, 215 Cal. Rptr. 860, 867 (1985)).

172. 777 F.2d at 448-49.

173. See Lopatka, *supra* note 25, at 5 (the California good faith and fair dealing exception is very close to a common law duty to discharge only for just cause).

174. 777 F.2d at 448-49.

175. *Id.* at 447.

discontinue voluntary extensions of job security as a prophylactic measure. Many California businesses responded to the rapid development of the exceptions to the employment-at-will rule prior to *DeHorney*. Examples of such actions by employers include: 1) requiring employees to sign a statement which defines their status as at-will; 2) hiring attorneys to review policy manuals to remove any assertions of job security; 3) hiring attorneys to consult upon and even effectuate termination decisions; and 4) purchasing insurance policies that protect an employer in the event of a finding of wrongful discharge liability.¹⁷⁶

The *DeHorney* decision does not coexist comfortably with California Labor Code Section 2922, because they both provide opposite presumptive protections.¹⁷⁷ The development of the common law good faith and fair dealing exception directly contradicts the judiciary's deference to the legislature regarding the public policy exception. Given the sweeping implications to both society and private enterprise by the expansion of the good faith and fair dealing exception, the *DeHorney* decision is clearly imprudent and any changes in the employment-at-will presumptions are arguably better left to the legislature.¹⁷⁸

CONCLUSION

The *DeHorney* decision places California in the untenable position of having a common law theory of recovery for wrongful termination that is in direct conflict with a statutory presumption of employment-at-will. This outcome is representative of the confusion and contradictions that surround the application of California's exceptions to the employment-at-will rule. When applying the public policy exception, California courts defer to a legislative definition of public policy. In stark contrast is the development of the good faith and fair dealing exception, which directly conflicts with statutory authority. Finally, the development of the implied contractual exception, while based upon modern contractual theories, adheres to an approach that allows a single common law factor to be determinative.

The most likely reason for this erratic and inconsistent development of wrongful discharge law is a desire to provide a remedy for employees whose

176. R. BAXTER & G. SINISCALCO, *MANAGERS GUIDE FOR LAWFUL TERMINATIONS* (1983) (book designed to help employers minimize economic risk associated with terminating employees); L. LARSON & P. BOROWSKY, *supra* note 3, § 9 (chapter detailing various employer defenses); Lopatka, *supra* note 25, at 26-32 (setting out preventive measures to minimize the risks of wrongful discharge liability).

177. See *supra* notes 22-24 and accompanying text.

178. See *supra* note 132. See also DeFranco, *Modification of the Employee At Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, 30 St. Louis U.L.J. 65 (1985) (courts do not have the investigatory machinery to analyze complex socio-economic data, nor are they empowered with the right to formulate public policy; therefore the judiciary should only provide a remedy that can be limited to those employees who need protection).

termination violates a judicial standard of fairness. The rationale supporting the *DeHorney* decision is suspect, and it is clear that the court stretched precedent in order to reach their desired result. While providing DeHorney with relief, the court failed to consider the significant societal and economic costs that are likely to result from expanding the good faith and fair dealing exception to the employment-at-will rule. Arguably, courts do not possess the investigatory resources required to evaluate the impact of such a pervasive decision.

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